

## SUBCHAPTER G—CONTRACT MANAGEMENT

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AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42370, Sept. 19, 1983, unless otherwise noted.

#### 42.000 Scope of part.

This part prescribes policies and procedures for assigning and performing contract administration and contract audit services.

[63 FR 9062, Feb. 23, 1998]

#### 42.001 [Reserved]

#### 42.002 Interagency agreements.

(a) Agencies shall avoid duplicate audits, reviews, inspections, and examinations of contractors or subcontractors, by more than one agency, through the use of interagency agreements.

(b) Subject to the fiscal regulations of the agencies and applicable interagency agreements, the requesting agency shall reimburse the servicing agency for rendered services in accordance with the Economy Act (31 U.S.C. 1535).

(c) When an interagency agreement is established, the agencies are encouraged to consider establishing procedures for the resolution of issues that may arise under the agreement.

[63 FR 9062, Feb. 23, 1998, as amended at 65 FR 36014, June 6, 2000]

#### 42.003 Cognizant Federal agency.

(a) For contractors other than educational institutions and nonprofit organizations, the cognizant Federal agency normally will be the agency with the largest dollar amount of negotiated contracts, including options. For educational institutions and nonprofit organizations, the cognizant Federal agency is established according to Subsection G.11 of OMB Circular A-21, Cost Principles for Educational Institutions, and Attachment A, Subsection E.2, of OMB Circular A-122, Cost Principles for Nonprofit Organizations, respectively.

(b) Once a Federal agency assumes cognizance for a contractor, it should remain cognizant for at least 5 years to ensure continuity and ease of administration. If, at the end of the 5-year period, another agency has the largest dollar amount of negotiated contracts, including options, the two agencies shall coordinate and determine which will assume cognizance. However, if circumstances warrant it and the affected agencies agree, cognizance may transfer prior to the expiration of the 5-year period.

[63 FR 9062, Feb. 23, 1998]

### **Subpart 42.1—Contract Audit Services**

SOURCE: 63 FR 9062, Feb. 23, 1998, unless otherwise noted.

#### **42.101 Contract audit responsibilities.**

(a) The auditor is responsible for—

(1) Submitting information and advice to the requesting activity, based on the auditor's analysis of the contractor's financial and accounting records or other related data as to the acceptability of the contractor's incurred and estimated costs;

(2) Reviewing the financial and accounting aspects of the contractor's cost control systems; and

(3) Performing other analyses and reviews that require access to the contractor's financial and accounting records supporting proposed and incurred costs.

(b) Normally, for contractors other than educational institutions and nonprofit organizations, the Defense Contract Audit Agency (DCAA) is the responsible Government audit agency. However, there may be instances where an agency other than DCAA desires cognizance of a particular contractor. In those instances, the two agencies shall agree on the most efficient and economical approach to meet contract audit requirements. For educational institutions and nonprofit organizations, audit cognizance will be determined according to the provisions of OMB Circular A-133, Audits of Institutions of Higher Education and Other Non-Profit Institutions.

#### **42.102 Assignment of contract audit services.**

(a) As provided in agency procedures or interagency agreements, contracting officers may request audit services directly from the responsible audit agency cited in the Directory of Federal Contract Audit Offices. The audit request should include a suspense date and should identify any information needed by the contracting officer.

(b) The responsible audit agency may decline requests for services on a case-by-case basis, if resources of the audit agency are inadequate to accomplish the tasks. Declinations shall be in writing.

#### **42.103 Contract audit services directory.**

(a) DCAA maintains and distributes the Directory of Federal Contract Audit Offices. The directory identifies cognizant audit offices and the contractors over which they have cognizance. Changes to audit cognizance shall be provided to DCAA so that the directory can be updated.

(b) Agencies may obtain a copy of the directory or information concerning cognizant audit offices by contacting the—Defense Contract Audit Agency, ATTN: CMO, Publications Officer, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

### **Subpart 42.2—Contract Administration Services**

SOURCE: 63 FR 9062, Feb. 23, 1998, unless otherwise noted.

#### **42.201 Contract administration responsibilities.**

(a) For each contract assigned for administration, the contract administration office (CAO) (see 48 CFR 2.101) shall—

(1) Perform the functions listed in 42.302(a) to the extent that they apply to the contract, except for the functions specifically withheld;

(2) Perform the functions listed in 42.302(b) only when and to the extent specifically authorized by the contracting officer; and

(3) Request supporting contract administration under 42.202(e) and (f) when it is required.

(b) The Defense Contract Management Agency and other agencies offer a wide variety of contract administration and support services.

[63 FR 9062, Feb. 23, 1998, as amended at 66 FR 2141, Jan. 10, 2001]

#### **42.202 Assignment of contract administration.**

(a) *Delegating functions.* As provided in agency procedures, contracting officers may delegate contract administration or specialized support services, either through interagency agreements or by direct request to the cognizant CAO listed in the Federal Directory of Contract Administration Services

Components. The delegation should include—

(1) The name and address of the CAO designated to perform the administration (this information also shall be entered in the contract);

(2) Any special instructions, including any functions withheld or any specific authorization to perform functions listed in 42.302(b);

(3) A copy of the contract to be administered; and

(4) Copies of all contracting agency regulations or directives that are—

(i) Incorporated into the contract by reference; or

(ii) Otherwise necessary to administer the contract, unless copies have been provided previously.

(b) *Special instructions.* As necessary, the contracting officer also shall advise the contractor (and other activities as appropriate) of any functions withheld from or additional functions delegated to the CAO.

(c) *Delegating additional functions.* For individual contracts or groups of contracts, the contracting office may delegate to the CAO functions not listed in 42.302: *Provided that*—

(1) Prior coordination with the CAO ensures the availability of required resources;

(2) In the case of authority to issue orders under provisioning procedures in existing contracts and under basic ordering agreements for items and services identified in the schedule, the head of the contracting activity or designee approves the delegation; and

(3) The delegation does not require the CAO to undertake new or follow-on acquisitions.

(d) *Rescinding functions.* The contracting officer at the requesting agency may rescind or recall a delegation to administer a contract or perform a contract administration function, except for functions pertaining to cost accounting standards and negotiation of forward pricing rates and indirect cost rates (also see 42.003). The requesting agency must coordinate with the CAO to establish a reasonable transition period prior to rescinding or recalling the delegation.

(e) *Secondary delegations of contract administration.* (1) A CAO that has been delegated administration of a contract

under paragraph (a) or (c) of this section, or a contracting office retaining contract administration, may request supporting contract administration from the CAO cognizant of the contractor location where performance of specific contract administration functions is required. The request shall—

(i) Be in writing;

(ii) Clearly state the specific functions to be performed; and

(iii) Be accompanied by a copy of pertinent contractual and other necessary documents.

(2) The prime contractor is responsible for managing its subcontracts. The CAO's review of subcontracts is normally limited to evaluating the prime contractor's management of the subcontracts (see Part 44). Therefore, supporting contract administration shall not be used for subcontracts unless—

(i) The Government otherwise would incur undue cost;

(ii) Successful completion of the prime contract is threatened; or

(iii) It is authorized under paragraph (f) of this section or elsewhere in this regulation.

(f) *Special surveillance.* For major system acquisitions (see Part 34), the contracting officer may designate certain high risk or critical subsystems or components for special surveillance in addition to requesting supporting contract administration. This surveillance shall be conducted in a manner consistent with the policy of requesting that the cognizant CAO perform contract administration functions at a contractor's facility (see 42.002).

(g) *Refusing delegation of contract administration.* An agency may decline a request for contract administration services on a case-by-case basis if resources of the agency are inadequate to accomplish the tasks. Declinations shall be in writing.

#### **42.203 Contract administration services directory.**

The Defense Contract Management Agency (DCMA) maintains and distributes the Federal Directory of Contract Administration Services Components. The directory lists the names and telephone numbers of those DCMA and other agency offices that offer contract

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administration services within designated geographic areas and at specified contractor plants. Federal agencies may obtain a free copy of the directory on disk by writing to—Defense Contract Management Agency, ATTN: DCMA-FBP, 8725 John J. Kingman Road, Fort Belvoir, VA 22060-6221, or access it on the Internet at <http://www.dcmil/casbook/casbook.htm>.

[63 FR 9062, Feb. 23, 1998, as amended at 66 FR 2141, Jan. 10, 2001]

### Subpart 42.3—Contract Administration Office Functions

#### 42.301 General.

When a contract is assigned for administration under Subpart 42.2, the contract administration office (CAO) shall perform contract administration functions in accordance with 48 CFR Chapter I, the contract terms, and, unless otherwise agreed to in an inter-agency agreement (see 42.002), the applicable regulations of the servicing agency.

[63 FR 9063, Feb. 23, 1998]

#### 42.302 Contract administration functions.

(a) The contracting officer normally delegates the following contract administration functions to a CAO. The contracting officer may retain any of these functions, except those in paragraphs (a)(5), (a)(9), and (a)(11) of this section, unless the cognizant Federal agency (see 2.101) has designated the contracting officer to perform these functions.

(1) Review the contractor's compensation structure.

(2) Review the contractor's insurance plans.

(3) Conduct post-award orientation conferences.

(4) Review and evaluate contractors' proposals under subpart 15.4 and, when negotiation will be accomplished by the contracting officer, furnish comments and recommendations to that officer.

(5) Negotiate forward pricing rate agreements (see 15.407-3).

(6) Negotiate advance agreements applicable to treatment of costs under

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contracts currently assigned for administration (see 31.109).

(7) Determine the allowability of costs suspended or disapproved as required (see subpart 42.8), direct the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved, and approve final vouchers.

(8) Issue Notices of Intent to Disallow or not Recognize Costs (see subpart 42.8).

(9) Establish final indirect cost rates and billing rates for those contractors meeting the criteria for contracting officer determination in subpart 42.7.

(10) Attempt to resolve issues in controversy, using ADR procedures when appropriate (see subpart 33.2); prepare findings of fact and issue decisions under the Disputes clause on matters in which the administrative contracting officer (ACO) has the authority to take definitive action.

(11) In connection with Cost Accounting Standards (see 48 CFR 30.601 and 48 CFR Chapter 99 (FAR Appendix))—

(i) Determine the adequacy of the contractor's disclosure statements;

(ii) Determine whether disclosure statements are in compliance with Cost Accounting Standards and part 31;

(iii) Determine the contractor's compliance with Cost Accounting Standards and disclosure statements, if applicable; and

(iv) Negotiate price adjustments and execute supplemental agreements under the Cost Accounting Standards clauses at 48 CFR 52.230-2, 52.230-3, 52.230-4, 52.230-5, and 52.230-6.

(12) Review and approve or disapprove the contractor's requests for payments under the progress payments or performance-based payments clauses.

(13) Make payments on assigned contracts when prescribed in agency acquisition regulations.

(14) Manage special bank accounts.

(15) Ensure timely notification by the contractor of any anticipated overrun or underrun of the estimated cost under cost-reimbursement contracts.

(16) Monitor the contractor's financial condition and advise the contracting officer when it jeopardizes contract performance.

(17) Analyze quarterly limitation on payments statements and recover overpayments from the contractor.

(18) Issue tax exemption forms.

(19) Ensure processing and execution of duty-free entry certificates.

(20) For classified contracts, administer those portions of the applicable industrial security program delegated to the CAO (see Subpart 4.4).

(21) Issue work requests under maintenance, overhaul, and modification contracts.

(22) Negotiate prices and execute supplemental agreements for spare parts and other items selected through provisioning procedures when prescribed by agency acquisition regulations.

(23) Negotiate and execute contractual documents for settlement of partial and complete contract terminations for convenience, except as otherwise prescribed by part 49.

(24) Negotiate and execute contractual documents settling cancellation charges under multi-year contracts.

(25) Process and execute novation and change of name agreements under subpart 42.12.

(26) Perform property administration (see part 45).

(27) Approve contractor acquisition or fabrication of special test equipment under the clause at 52.245-18, Special Test Equipment.

(28) Perform necessary screening, redistribution, and disposal of contractor inventory.

(29) Issue contract modifications requiring the contractor to provide packing, crating, and handling services on excess Government property. When the ACO determines it to be in the Government's interests, the services may be secured from a contractor other than the contractor in possession of the property.

(30) In facilities contracts—

(i) Evaluate the contractor's requests for facilities and for changes to existing facilities and provide appropriate recommendations to the contracting officer;

(ii) Ensure required screening of facility items before acquisition by the contractor;

(iii) Approve use of facilities on a noninterference basis in accordance

with the clause at 52.245-9, Use and Charges;

(iv) Ensure payment by the contractor of any rental due; and

(v) Ensure reporting of items no longer needed for Government production.

(31) Perform production support, surveillance, and status reporting, including timely reporting of potential and actual slippages in contract delivery schedules.

(32) Perform preaward surveys (see Subpart 9.1).

(33) Advise and assist contractors regarding their priorities and allocations responsibilities and assist contracting offices in processing requests for special assistance and for priority ratings for privately owned capital equipment.

(34) Monitor contractor industrial labor relations matters under the contract; apprise the contracting officer and, if designated by the agency, the cognizant labor relations advisor, of actual or potential labor disputes; and coordinate the removal of urgently required material from the strikebound contractor's plant upon instruction from, and authorization of, the contracting officer.

(35) Perform traffic management services, including issuance and control of Government bills of lading and other transportation documents.

(36) Review the adequacy of the contractor's traffic operations.

(37) Review and evaluate preservation, packaging, and packing.

(38) Ensure contractor compliance with contractual quality assurance requirements (see part 46).

(39) Ensure contractor compliance with contractual safety requirements.

(40) Perform engineering surveillance to assess compliance with contractual terms for schedule, cost, and technical performance in the areas of design, development, and production.

(41) Evaluate for adequacy and perform surveillance of contractor engineering efforts and management systems that relate to design, development, production, engineering changes, subcontractors, tests, management of engineering resources, reliability and maintainability, data control systems, configuration management, and independent research and development.

(42) Review and evaluate for technical adequacy the contractor's logistics support, maintenance, and modification programs.

(43) Report to the contracting office any inadequacies noted in specifications.

(44) Perform engineering analyses of contractor cost proposals.

(45) Review and analyze contractor-proposed engineering and design studies and submit comments and recommendations to the contracting office, as required.

(46) Review engineering change proposals for proper classification, and when required, for need, technical adequacy of design, producibility, and impact on quality, reliability, schedule, and cost; submit comments to the contracting office.

(47) Assist in evaluating and make recommendations for acceptance or rejection of waivers and deviations.

(48) Evaluate and monitor the contractor's procedures for complying with procedures regarding restrictive markings on data.

(49) Monitor the contractor's value engineering program.

(50) Review, approve or disapprove, and maintain surveillance of the contractor's purchasing system (see part 44).

(51) Consent to the placement of subcontracts.

(52) Review, evaluate, and approve plant or division-wide small, small disadvantaged and women-owned small business master subcontracting plans.

(53) Obtain the contractor's currently approved company- or division-wide plans for small, small disadvantaged and women-owned small business subcontracting for its commercial products, or, if there is no currently approved plan, assist the contracting officer in evaluating the plans for those products.

(54) Assist the contracting officer, upon request, in evaluating an offeror's proposed small, small disadvantaged and women-owned small business subcontracting plans, including documentation of compliance with similar plans under prior contracts.

(55) By periodic surveillance, ensure the contractor's compliance with small, small disadvantaged and

women-owned small business subcontracting plans and any labor surplus area contractual requirements; maintain documentation of the contractor's performance under and compliance with these plans and requirements; and provide advice and assistance to the firms involved, as appropriate.

(56) Maintain surveillance of flight operations.

(57) Assign and perform supporting contract administration.

(58) Ensure timely submission of required reports.

(59) Issue administrative changes, correcting errors or omissions in typing, contractor address, facility or activity code, remittance address, computations, which do not require additional contract funds, and other such changes (see 43.101).

(60) Cause release of shipments from contractor's plants according to the shipping instructions. When applicable, the order of assigned priority shall be followed; shipments within the same priority shall be determined by date of the instruction.

(61) Obtain contractor proposals for any contract price adjustments resulting from amended shipping instructions. Review all amended shipping instructions on a periodic, consolidated basis to ensure that adjustments are timely made. Except when the ACO has settlement authority, the ACO shall forward the proposal to the contracting officer for contract modification. The ACO shall not delay shipments pending completion and formalization of negotiations of revised shipping instructions.

(62) Negotiate and/or execute supplemental agreements, as required, making changes in packaging subcontractors or contract shipping points.

(63) Cancel unilateral purchase orders when notified of nonacceptance by the contractor. The CAO shall notify the contracting officer when the purchase order is canceled.

(64) Negotiated and execute one-time supplemental agreements providing for the extension of contract delivery schedules up to 90 days on contracts with an assigned Critically Designator of C (see 42.1105). Notification that the

contract delivery schedule is being extended shall be provided to the contracting office. Subsequent extensions on any individual contract shall be authorized only upon concurrence of the contracting office.

(65) Accomplish administrative close-out procedures (see 4.804-5).

(66) Determine that the contractor has a drug-free workplace program and drug free awareness program (see subpart 23.5).

(67) Support the program, product, and project offices regarding program reviews, program status, program performance and actual or anticipated program problems.

(68) Monitor the contractor's environmental practices for adverse impact on contract performance or contract cost, and for compliance with environmental requirements specified in the contract. ACO responsibilities include—

(i) Requesting environmental technical assistance, if needed;

(ii) Monitoring contractor compliance with specifications requiring the use of environmentally preferable products, energy-efficient products, and materials or delivery of end products with specified recovered material content. This must occur as part of the quality assurance procedures set forth in Part 46; and

(iii) As required in the contract, ensuring that the contractor complies with the reporting requirements relating to recovered material content utilized in contract performance (see subpart 23.4).

(69) Administer commercial financing provisions and monitor contractor security to ensure its continued adequacy to cover outstanding payments, when on-site review is required.

(70) Deobligate excess funds after final price determination.

(b) The CAO shall perform the following functions only when and to the extent specifically authorized by the contracting office:

(1) Negotiate or negotiate and execute supplemental agreements incorporating contractor proposals resulting from change orders issued under the Changes clause. Before completing negotiations, coordinate any delivery

schedule change with the contracting office.

(2) Negotiate prices and execute priced exhibits for unpriced orders issued by the contracting officer under basic ordering agreements.

(3) Negotiate or negotiate and execute supplemental agreements changing contract delivery schedules.

(4) Negotiate or negotiate and execute supplemental agreements providing for the deobligation of unexpended dollar balances considered excess to known contract requirements.

(5) Issue amended shipping instructions and, when necessary, negotiate and execute supplemental agreements incorporating contractor proposals resulting from these instructions.

(6) Negotiate changes to interim billing prices.

(7) Negotiate and definitize adjustments to contract prices resulting from exercise of an economic price adjustment clause (see subpart 16.2).

(8) Issue change orders and negotiate and execute resulting supplemental agreements under contracts for ship construction, conversion, and repair.

(9) Execute supplemental agreements on firm-fixed price supply contracts to reduce required contract line item quantities and deobligate excess funds when notified by the contractor of an inconsequential delivery shortage, and it is determined that such action is in the best interests of the Government, notwithstanding the default provisions of the contract. Such action will be taken only upon the written request of the contractor and, in no event shall the total downward contract price adjustment resulting from an inconsequential delivery shortage exceed \$250.00 or 5 percent of the contract price, whichever is less.

(10) Execute supplemental agreements to permit a chance in place of inspection at origin specified in firm fixed-price supply contracts awarded to nonmanufacturers, as deemed necessary to protect the Government's interests.

(11) Prepare evaluations of contractor performance in accordance with subpart 42.15.

(c) Any additional contract administration functions not listed in 42.302(a)



and (b), or not otherwise delegated, remain the responsibility of the contracting office.

[48 FR 42370, Sept. 19, 1983, as amended at 54 FR 34756, Aug. 21, 1989; 54 FR 48989, Nov. 28, 1989; 55 FR 21708, May 25, 1990; 55 FR 38517, Sept. 18, 1990; 56 FR 15154, Apr. 15, 1991; 59 FR 11382, Mar. 10, 1994; 59 FR 67043, Dec. 28, 1994; 60 FR 16719, Mar. 31, 1995; 60 FR 28498, May 31, 1995; 60 FR 48264, Sept. 18, 1995; 60 FR 49717, Sept. 26, 1995; 61 FR 18918, Apr. 29, 1996; 62 FR 237, Jan. 2, 1997; 62 FR 40237, July 25, 1997; 62 FR 44812, Aug. 22, 1997; 62 FR 51271, Sept. 30, 1997; 63 FR 9063, Feb. 23, 1998; 64 FR 72445, Dec. 27, 1999; 66 FR 2133, Jan. 10, 2001; 66 FR 65353, Dec. 18, 2001]

### **Subpart 42.4—Correspondence and Visits**

#### **42.401 Contract correspondence.**

(a) The contracting officer (or other contracting agency personnel) normally shall (1) forward correspondence relating to assigned contract administration functions through the cognizant contract administration office (CAO) to the contractor and (2) provide a copy for the CAO's file. When urgency requires sending such correspondence directly to the contractor, a copy shall be sent concurrently to the CAO.

(b) The CAO shall send the contracting office a copy of pertinent correspondence conducted between the CAO and the contractor.

#### **42.402 Visits to contractors' facilities.**

(a) Government personnel planning to visit a contractor's facility in connection with one or more Government contracts shall provide prior notification to the cognizant CAO, with the following information, sufficiently in advance to permit the CAO to make necessary arrangements. Such notification is for the purpose of eliminating duplicative reviews, requests, investigations, and audits relating to the contract administration functions in subpart 42.3 delegated to CAO's and shall, as a minimum, include the following (see also paragraph (b) of this section):

(1) Visitors' names, official positions, and security clearances.

(2) Date and duration of visit.

(3) Name and address of contractor and personnel to be contacted.

(4) Contract number, program involved, and purpose of visit.

(5) If desired, visitors to a contractor's plant may request that a representative of the CAO accompany them. In any event, the CAO has final authority to decide whether a representative shall accompany a visitor.

(b) If the visit will result in reviewing, auditing, or obtaining any information from the contractor relating to contract administration functions, the prospective visitor shall identify the information in sufficient detail so as to permit the CAO, after consultation with the contractor and the cognizant audit office, to determine whether such information, adequate to fulfill the requirement, has recently been reviewed by or is available within the Government. If so, the CAO will discourage the visit and refer the prospective visitor to the Government office where such information is located. Where the office is the CAO, such information will be immediately forwarded or otherwise made available to the requestor.

(c) Visitors shall fully inform the CAO of any agreements reached with the contractor or other results of the visit that may affect the CAO.

[48 FR 42370, Sept. 19, 1983, as amended at 53 FR 662, Jan. 11, 1988; 53 FR 17859, May 18, 1988]

#### **42.403 Evaluation of contract administration offices.**

Onsite inspections or evaluations of the performance of the assigned functions of a contract administration office shall be accomplished only by or under the direction of the agency of which that office is a part.

### **Subpart 42.5—Postaward Orientation**

#### **42.500 Scope of subpart.**

This subpart prescribes policies and procedures for the postaward orientation of contractors and subcontractors through (a) a conference or (b) a letter or other form of written communication.

#### **42.501 General.**

(a) A postaward orientation aids both Government and contractor personnel

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to (1) achieve a clear and mutual understanding of all contract requirements and (2) identify and resolve potential problems. However, it is not a substitute for the contractor's fully understanding the work requirements at the time offers are submitted, nor is it to be used to alter the final agreement arrived at in any negotiations leading to contract award.

(b) Postaward orientation is encouraged to assist small business, small disadvantaged and women-owned small business concerns (see part 19).

(c) While cognizant Government or contractor personnel may request the contracting officer to arrange for orientation, it is up to the contracting officer to decide whether a postaward orientation in any form is necessary.

(d) Maximum benefits will be realized when orientation is conducted promptly after award.

[48 FR 42370, Sept. 19, 1983, as amended at 60 FR 48264, Sept. 18, 1995]

### **42.502 Selecting contracts for postaward orientation.**

When deciding whether postaward orientation is necessary and, if so, what form it shall take, the contracting officer shall consider, as a minimum, the—

(a) Nature and extent of the preaward survey and any other prior discussions with the contractor;

(b) Type, value, and complexity of the contract;

(c) Complexity and acquisition history of the product or service;

(d) Requirements for spare parts and related equipment;

(e) Urgency of the delivery schedule and relationship of the product or service to critical programs;

(f) Length of the planned production cycle;

(g) Extent of subcontracting;

(h) Contractor's performance history and experience with the product or service;

(i) Contractor's status, if any, as a small business, small disadvantaged or women-owned small business concern;

(j) Contractor's performance history with small, small disadvantaged and women-owned small business subcontracting programs;

(k) Safety precautions required for hazardous materials or operations; and

(l) Complex financing arrangements, such as progress payments, advance payments, or guaranteed loans.

[48 FR 42370, Sept. 19, 1983, as amended at 60 FR 48264, Sept. 18, 1995]

### **42.503 Postaward conferences.**

#### **42.503-1 Postaward conference arrangements.**

(a) The contracting officer who decides that a conference is needed is responsible for—

(1) Establishing the time and place of the conference;

(2) Preparing the agenda, when necessary;

(3) Notifying appropriate Government representatives (e.g., contracting/contract administration office) and the contractor;

(4) Designating or acting as the chairperson;

(5) Conducting a preliminary meeting of Government personnel; and

(6) Preparing a summary report of the conference.

(b) When the contracting office initiates a conference, the arrangements may be made by that office or, at its request, by the contract administration office.

#### **42.503-2 Postaward conference procedure.**

The chairperson of the conference shall conduct the meeting. Unless a contract change is contemplated, the chairperson shall emphasize that it is not the purpose of the meeting to change the contract. The contracting officer may make commitments or give directions within the scope of the contracting officer's authority and shall put in writing and sign any commitment or direction, whether or not it changes the contract. Any change to the contract that results from the postaward conference shall be made only by a contract modification referencing the applicable terms of the contract. Participants without authority to bind the Government shall not take action that in any way alters the contract. The chairperson shall include in the summary report (see 42.503-3

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below) all information and guidance provided to the contractor.

[66 FR 42370, Sept. 19, 1983, as amended at 66 FR 2133, Jan. 10, 2001]

#### **42.503-3 Postaward conference report.**

The chairperson shall prepare and sign a report of the postaward conference. The report shall cover all items discussed, including areas requiring resolution, controversial matters, the names of the participants assigned responsibility for further actions, and the due dates for the actions. The chairperson shall furnish copies of the report to the contracting office, the contract administration office, the contractor, and others who require the information.

#### **42.504 Postaward letters.**

In some circumstances, a letter or other written form of communication to the contractor may be adequate postaward orientation (in lieu of a conference). The letter should identify the Government representative responsible for administering the contract and cite any unusual or significant contract requirements. The rules on changes to the contract in 42.503-2 also apply here.

#### **42.505 Postaward subcontractor conferences.**

(a) The prime contractor is generally responsible for conducting postaward conferences with subcontractors. However, the prime contractor may invite Government representatives to a conference with subcontractors, or the Government may request that the prime contractor initiate a conference with subcontractors. The prime contractor should ensure that representatives from involved contract administration offices are invited.

(b) Government representatives (1) must recognize the lack of privity of contract between the Government and subcontractors, (2) shall not take action that is inconsistent with or alters subcontracts, and (3) shall ensure that any changes in direction or commitment affecting the prime contract or contractor resulting from a subcontractor conference are made by written direction of the contracting officer to the prime contractor in the same manner as described in 42.503-2.

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### **Subpart 42.6—Corporate Administrative Contracting Officer**

#### **42.601 General.**

Contractors with more than one operational location (e.g., division, plant, or subsidiary) often have corporate-wide policies, procedures, and activities requiring Government review and approval and affecting the work of more than one administrative contracting officer (ACO). In these circumstances, effective and consistent contract administration may require the assignment of a corporate administrative contracting officer (CACO) to deal with corporate management and to perform selected contract administration functions on a corporate-wide basis.

#### **42.602 Assignment and location.**

(a) A CACO may be assigned only when (1) the contractor has at least two locations with resident ACO's or (2) the need for a CACO is approved by the agency head or designee (for this purpose, a nonresident ACO will be considered as resident if at least 75 percent of the ACO's effort is devoted to a single contractor). One of the resident ACO's may be designated to perform the CACO functions, or a full-time CACO may be assigned. In determining the location of the CACO, the responsible agency shall take into account such factors as the location(s) of the corporate records, corporate office, major plant, cognizant government auditor, and overall cost effectiveness.

(b) A decision to initiate or discontinue a CACO assignment should be based on such factors as (1) the benefits of coordination and liaison at the corporate level, (2) the volume of Government sales, (3) the degree of control exercised by the contractor's corporate office over Government-oriented lower-tier operating elements, and (4) the impact of corporate policies and procedures on those elements.

(c) Responsibility for assigning a CACO shall be determined as follows:

(1) When all locations of a corporate entity are under the contract administration cognizance of a single agency, that agency is responsible.

(2) When the locations are under the contract administration cognizance of

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more than one agency, the agencies concerned shall agree on the responsible agency (normally on the basis of the agency with the largest dollar balance, including options, of affected contracts). In such cases, agencies may also consider geographic location.

(d) The directory of contract administration services components referenced in 42.203 includes a listing of CACO's and the contractors for which they are assigned responsibility.

[48 FR 42370, Sept. 19, 1983, as amended at 63 FR 9064, Feb. 23, 1998]

### 42.603 Responsibilities.

(a) The CACO shall perform, on a corporate-wide basis, the contract administration functions as designated by the responsible agency. Typical CACO functions include (1) the determination of final indirect cost rates for cost-reimbursement contracts, (2) establishment of advance agreements or recommendations on corporate/home office expense allocations, and (3) administration of Cost Accounting Standards (CAS) applicable to corporate-level and corporate-directed accounting practices.

(b) The CACO shall—

(1) Fully utilize the responsible contract audit agency financial and advisory accounting services, including (i) advice regarding the acceptability of corporate-wide policies and (ii) advisory audit reports;

(2) Keep cognizant ACO's and auditors informed of important matters under consideration and determinations made; and

(3) Solicit their advice and participation as appropriate.

[48 FR 42370, Sept. 19, 1983, as amended at 63 FR 9064, Feb. 23, 1998]

## Subpart 42.7—Indirect Cost Rates

### 42.700 Scope of subpart.

This subpart prescribes policies and procedures for establishing (a) billing rates and (b) final indirect cost rates.

### 42.701 Definition.

*Billing rate* as used in this subpart means an indirect cost rate (1) established temporarily for interim reimbursement of incurred indirect costs

and (2) adjusted as necessary pending establishment of final indirect cost rates.

[48 FR 42370, Sept. 19, 1983, as amended at 59 FR 11387, Mar. 10, 1994; 63 FR 9064, Feb. 23, 1998; 66 FR 2133, Jan. 10, 2001]

### 42.702 Purpose.

(a) Establishing final indirect cost rates under this subpart provides—

(1) Uniformity of approach with a contractor when more than one contract or agency is involved;

(2) Economy of administration; and

(3) Timely settlement under cost-reimbursement contracts.

(b) Establishing billing rates provides a method for interim reimbursement of indirect costs at estimated rates subject to adjustment during contract performance and at the time the final indirect cost rates are established.

### 42.703 General.

#### 42.703-1 Policy.

(a) A single agency (see 42.705-1) shall be responsible for establishing final indirect cost rates for each business unit. These rates shall be binding on all agencies and their contracting offices, unless otherwise specifically prohibited by statute. An agency shall not perform an audit of indirect cost rates when the contracting officer determines that the objectives of the audit can reasonably be met by accepting the results of an audit that was conducted by any other department or agency of the Federal Government (10 U.S.C. 2313(d) and 41 U.S.C. 254d(d)).

(b) Billing rates and final indirect cost rates shall be used in reimbursing indirect costs under cost-reimbursement contracts and in determining progress payments under fixed-price contracts.

(c) To ensure compliance with 10 U.S.C. 2324(a) and 41 U.S.C. 256(a)—

(1) Final indirect cost rates shall be used for contract closeout for a business unit, unless the quick-closeout procedure in 42.708 is used. These final rates shall be binding for all cost-reimbursement contracts at the business unit, subject to any specific limitation in a contract or advance agreement; and

(2) Established final indirect cost rates shall be used in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established, unless the quick-closeout procedure in 42.708 is used.

[48 FR 42370, Sept. 19, 1983, as amended at 60 FR 42661, Aug. 16, 1995. Redesignated at 60 FR 42664, Aug. 16, 1995, as amended at 62 FR 274, Jan. 2, 1997; 63 FR 9064, Feb. 23, 1998]

#### 42.703-2 Certificate of indirect costs.

(a) *General.* In accordance with 10 U.S.C. 2324(h) and 41 U.S.C. 256(h), a proposal shall not be accepted and no agreement shall be made to establish final indirect cost rates unless the costs have been certified by the contractor.

(b) *Waiver of certification.* (1) The agency head, or designee, may waive the certification requirement when—

(i) It is determined to be in the interest of the United States; and

(ii) The reasons for the determination are put in writing and made available to the public.

(2) A waiver may be appropriate for a contract with—

(i) A foreign government or international organization, such as a subsidiary body of the North Atlantic Treaty Organization;

(ii) A state or local government subject to OMB Circular A-87;

(iii) An educational institution subject to OMB Circular A-21; and

(iv) A nonprofit organization subject to OMB Circular A-122.

(c) *Failure to certify.* (1) If the contractor has not certified its proposal for final indirect cost rates and a waiver is not appropriate, the contracting officer may unilaterally establish the rates.

(2) Rates established unilaterally should be—

(i) Based on audited historical data or other available data as long as unallowable costs are excluded; and

(ii) Set low enough to ensure that unallowable costs will not be reimbursed.

(d) *False certification.* The contracting officer should consult with legal counsel to determine appropriate action

when a contractor's certificate of final indirect costs is thought to be false.

(e) *Penalties for unallowable costs.* 10 U.S.C. 2324(a) through (d) and 41 U.S.C. 256 (a) through (d) prescribe penalties for submission of unallowable costs in final indirect cost rate proposals (see 42.709 for penalties and contracting officer responsibilities).

(f) *Contract clause.* (1) Except as provided in paragraph (f)(2) of this subsection, the clause at 52.242-4, Certification of Final Indirect Costs, shall be incorporated into all solicitations and contracts which provide for establishment of final indirect cost rates.

(2) The Department of Energy may provide an alternate clause in its agency supplement for its Management and Operating contracts.

[60 FR 42664, Aug. 16, 1995, as amended at 62 FR 237, Jan. 2, 1997; 62 FR 10710, Mar. 10, 1997; 63 FR 9064, Feb. 23, 1998]

#### 42.704 Billing rates.

(a) The contracting officer (or cognizant Federal agency official) or auditor responsible under 42.705 for establishing the final indirect cost rates also shall be responsible for determining the billing rates.

(b) The contracting officer (or cognizant Federal agency official) or auditor shall establish billing rates on the basis of information resulting from recent review, previous rate audits or experience, or similar reliable data or experience of other contracting activities. In establishing billing rates, the contracting officer (or cognizant Federal agency official) or auditor should ensure that the billing rates are as close as possible to the final indirect cost rates anticipated for the contractor's fiscal period, as adjusted for any unallowable costs. When the contracting officer (or cognizant Federal agency official) or auditor determines that the dollar value of contracts requiring use of billing rates does not warrant submission of a detailed billing rate proposal, the billing rates may be established by making appropriate adjustments from the prior year's indirect cost experience to eliminate unallowable and nonrecurring costs and to reflect new or changed conditions.

(c) Once established, billing rates may be prospectively or retroactively

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revised by mutual agreement of the contracting officer (or cognizant Federal agency official) or auditor and the contractor at either party's request, to prevent substantial overpayment or underpayment. When agreement cannot be reached, the billing rates may be unilaterally determined by the contracting officer (or cognizant Federal agency official).

(d) The elements of indirect cost and the base or bases used in computing billing rates shall not be construed as determinative of the indirect costs to be distributed or of the bases of distribution to be used in the final settlement.

(e) When the contractor provides to the cognizant contracting officer the certified final indirect cost rate proposal in accordance with 42.705-(b) or 42.705-(b), the contractor and the Government may mutually agree to revise billing rates to reflect the proposed indirect cost rates, as approved by the Government to reflect historically disallowed amounts from prior years' audits, until the proposal has been audited and settled. The historical decrement will be determined by either the cognizant contracting officer (42.705-1(b)) or the cognizant auditor (42.705-2(b)).

[48 FR 42370, Sept. 19, 1983, as amended at 61 FR 69296, Dec. 31, 1996; 63 FR 9064, Feb. 23, 1998]

### 42.705 Final indirect cost rates.

(a) Final indirect cost rates shall be established on the basis of—

(1) Contracting officer determination procedure (see 42.705-1) or

(2) Auditor determination procedure (see 42.705-2).

(b) Within 120 days (or longer period, if approved in writing by the contracting officer,) after settlement of the final annual indirect cost rates for all years of a physically complete contract, the contractor must submit a completion invoice or voucher reflecting the settled amounts and rates. To determine whether a period longer than 120 days is appropriate, the contracting officer should consider whether there are extenuating circumstances, such as the following:

(1) Pending closeout of subcontracts awaiting Government audit.

(2) Pending contractor, subcontractor, or Government claims.

(3) Delays in the disposition of Government property.

(4) Delays in contract reconciliation.

(5) Any other pertinent factors.

(c)(1) If the contractor fails to submit a completion invoice or voucher within the time specified in paragraph (b) of this section, the contracting officer may—

(i) Determine the amounts due to the contractor under the contract; and

(ii) Record this determination in a unilateral modification to the contract.

(2) This contracting officer determination must be issued as a final decision in accordance with 33.211.

[61 FR 69296, Dec. 31, 1996, as amended at 67 FR 6119, Feb. 8, 2002]

### 42.705-1 Contracting officer determination procedure.

(a) *Applicability and responsibility.* Contracting officer determination shall be used for the following, with the indicated cognizant contracting officer (or cognizant Federal agency official) responsible for establishing the final indirect cost rates:

(1) Business units of a multidivisional corporation under the cognizance of a corporate administrative contracting officer (see subpart 42.6), with that officer responsible for the determination, assisted, as required, by the administrative contracting officers assigned to the individual business units. Negotiations may be conducted on a coordinated or centralized basis, depending upon the degree of centralization within the contractor's organization.

(2) Business units not under the cognizance of a corporate administrative contracting officer, but having a resident administrative contracting officer (see 42.602), with that officer responsible for the determination. For this purpose, a nonresident administrative contracting officer is considered as resident if at least 75 percent of the administrative contracting officer's time is devoted to a single contractor.

(3) For business units not included in paragraph (a)(1) or (a)(2) of this subsection, the contracting officer (or cognizant Federal agency official) will determine whether the rates will be contracting officer or auditor determined.

(4) Educational institutions (see 42.705-3).

(5) State and local governments (see 42.705-4).

(6) Nonprofit organizations other than educational and state and local governments (see 42.705-5).

(b) *Procedures.* (1) In accordance with the Allowable Cost and Payment clause at 52.216-7 or 52.216-13, the contractor shall submit to the contracting officer (or cognizant Federal agency official) and to the cognizant auditor a final indirect cost rate proposal. The required content of the proposal and supporting data will vary depending on such factors as business type, size, and accounting system capabilities. The contractor, contracting officer, and auditor must work together to make the proposal, audit, and negotiation process as efficient as possible. Accordingly, each contractor shall submit an adequate proposal to the contracting officer (or cognizant Federal agency official) and auditor within the 6-month period following the expiration of each of its fiscal years. Reasonable extensions, for exceptional circumstances only, may be requested in writing by the contractor and granted in writing by the contracting officer. A contractor shall support its proposal with adequate supporting data. For guidance on what generally constitutes an adequate final indirect cost rate proposal and supporting data, contractors should refer to the Model Incurred Cost Proposal in Chapter 6 of the Defense Contract Audit Agency Pamphlet No. 7641.90, Information for Contractors, available via the Internet at <http://www.dcaa.mil>.

(2) The auditor shall submit to the contracting officer (or cognizant Federal agency official) an advisory audit report identifying any relevant advance agreements or restrictive terms of specific contracts.

(3) The contracting officer (or cognizant Federal agency official) shall head the Government negotiating team, which includes the cognizant

auditor and technical or functional personnel as required. Contracting offices having significant dollar interest shall be invited to participate in the negotiation and in the preliminary discussion of critical issues. Individuals or offices that have provided a significant input to the Government position should be invited to attend.

(4) The Government negotiating team shall develop a negotiation position. Pursuant to 10 U.S.C. 2324(f) and 41 U.S.C. 256(f), the contracting officer shall—

(i) Not resolve any questioned costs until obtaining—

(A) Adequate documentation on the costs; and

(B) The contract auditor's opinion on the allowability of the costs.

(ii) Whenever possible, invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

(5) The cognizant contracting officer shall—

(i) Conduct negotiations;

(ii) Prepare a written indirect cost rate agreement conforming to the requirements of the contracts;

(iii) Prepare, sign, and place in the contractor general file (see 4.801(c)(3)) a negotiation memorandum covering (A) the disposition of significant matters in the advisory audit report, (B) reconciliation of all costs questioned, with identification of items and amounts allowed or disallowed in the final settlement as well as the disposition of period costing or allocability issues, (C) reasons why any recommendations of the auditor or other Government advisors were not followed, and (D) identification of cost or pricing data submitted during the negotiations and relied upon in reaching a settlement; and

(iv) Distribute resulting documents in accordance with 42.706.

(v) Notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance.

[48 FR 42370, Sept. 19, 1983, as amended at 60 FR 42661, Aug. 16, 1995; 62 FR 51258, Sept. 30, 1997; 63 FR 9064, Feb. 23, 1998; 67 FR 6120, Feb. 8, 2002]

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### 42.705-2 Auditor determination procedure.

(a) *Applicability and responsibility.* (1) The cognizant Government auditor shall establish final indirect cost rates for business units not covered in 42.705-1(a).

(2) In addition, auditor determination may be used for business units that are covered in 42.705-1(a) when the contracting officer (or cognizant Federal agency official) and auditor agree that the indirect costs can be settled with little difficulty and any of the following circumstances apply:

(i) The business unit has primarily fixed-price contracts, with only minor involvement in cost-reimbursement contracts.

(ii) The administrative cost of contracting officer determination would exceed the expected benefits.

(iii) The business unit does not have a history of disputes and there are few cost problems.

(iv) The contracting officer (or cognizant Federal agency official) and auditor agree that special circumstances require auditor determination.

(b) *Procedures.* (1) The contractor shall submit to the cognizant contracting officer (or cognizant Federal agency official) and auditor a final indirect cost rate proposal in accordance with 42.705-1(b)(1).

(2) Upon receipt of a proposal, the auditor shall—

(i) Audit the proposal and seek agreement on indirect costs with the contractor;

(ii) Prepare an indirect cost rate agreement conforming to the requirements of the contracts. The agreement shall be signed by the contractor and the auditor;

(iii) If agreement with the contractor is not reached, forward the audit report to the contracting officer (or cognizant Federal agency official) identified in the Directory of Contract Administration Services Components (see 42.203), who will then resolve the disagreement; and

(iv) Distribute resulting documents in accordance with 42.706.

[48 FR 42370, Sept. 19, 1983, as amended at 59 FR 67052, Dec. 28, 1994; 62 FR 51258, Sept. 30, 1997; 63 FR 9065, Feb. 23, 1998]

### 42.705-3 Educational institutions.

(a) *General.* (1) Postdetermined final indirect cost rates shall be used in the settlement of indirect costs for all cost-reimbursement contracts with educational institutions, unless predetermined final indirect cost rates are authorized and used (see paragraph (b) below).

(2) OMB Circular No. A-21, Cost Principles for Educational Institutions, assigns each educational institution to a single Government agency for the negotiation of indirect cost rates and provides that those rates shall be accepted by all Federal agencies. Cognizant Government agencies and educational institutions are listed in the Directory of Federal Contract Audit Offices (see 42.103).

(3) The cognizant agency shall establish the billing rates and final indirect cost rates at the educational institution, consistent with the requirements of this subpart, subpart 31.3, and the OMB Circular. The agency shall follow the procedures outlined in 42.705-1(b).

(4) If the cognizant agency is unable to reach agreement with an institution, the appeals system of the cognizant agency shall be followed for resolution of the dispute.

(b) *Predetermined final indirect cost rates.* (1) Under cost-reimbursement research and development contracts with universities, colleges, or other educational institutions (41 U.S.C. 254a), payment for reimbursable indirect costs may be made on the basis of predetermined final indirect cost rates. The cognizant agency is not required to establish predetermined rates, but if they *are* established, their use must be extended to all the institution's Government contracts.

(2) In deciding whether the use of predetermined rates would be appropriate for the educational institution concerned, the agency should consider both the stability of the institution's indirect costs and bases over a period of years and any anticipated changes in the amount of the direct and indirect costs.

(3) Unless their use is approved at a level in the agency (see subparagraph (a)(2) above) higher than the contracting officer, predetermined rates shall not be used when—



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(i) There has been no recent audit of the indirect costs;

(ii) There have been frequent or wide fluctuations in the indirect cost rates and the bases over a period of years; or

(iii) The estimated reimbursable costs for any individual contract are expected to exceed \$1 million annually.

(4)(i) If predetermined rates are to be used and no rates have been previously established for the institution's current fiscal year, the agency shall obtain from the institution a proposal for predetermined rates.

(ii) If the proposal is found to be generally acceptable, the agency shall negotiate the predetermined rates with the institution. The rates should be based on an audit of the institution's costs for the year immediately preceding the year in which the rates are being negotiated. If this is not possible, an earlier audit may be used, but appropriate steps should be taken to identify and evaluate significant variations in costs incurred or in bases used that may have a bearing on the reasonableness of the proposed rates. However, in the case of smaller contracts (e.g., \$100,000 or less), an audit made at an earlier date is acceptable if (A) there have been no significant changes in the contractor's organization and (B) it is reasonably apparent that another audit would have little effect on the rates finally agreed upon and the potential for overpayment of indirect cost is relatively insignificant.

(5) If predetermined rates are used—

(i) The contracting officer shall include the negotiated rates and bases in the contract Schedule; and

(ii) See 16.307(i), which prescribes the clause at 52.216-15, Predetermined Indirect Cost Rates.

(6) Predetermined indirect cost rates shall be applicable for a period of not more than four years. The agency shall obtain the contractor's proposal for new predetermined rates sufficiently in advance so that the new rates, based on current data, may be promptly negotiated near the beginning of the new fiscal year or other period agreed to by the parties (see paragraphs (b) and (d) of the clause at 52.216-15, Predetermined Indirect Cost Rates).

(7) Contracting officers shall use billing rates established by the agency to

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reimburse the contractor for work performed during a period not covered by predetermined rates.

[48 FR 42370, Sept. 19, 1983, as amended at 61 FR 31622, June 20, 1996; 63 FR 9065, Feb. 23, 1998]

**42.705-4 State and local governments.**

OMB Circular No. A-87 concerning cost principles for state and local governments (see subpart 31.6) establishes the cognizant agency concept and procedures for determining a cognizant agency for approving state and local government indirect costs associated with federally-funded programs and activities. The indirect cost rates negotiated by the cognizant agency will be used by all Federal agencies that also award contracts to these same state and local governments.

**42.705-5 Nonprofit organizations other than educational and state and local governments.**

See OMB Circular No. A-122.

**42.706 Distribution of documents.**

(a) The contracting officer or auditor shall promptly distribute executed copies of the indirect cost rate agreement to the contractor and to each affected contracting agency and shall provide copies of the agreement for the contract files, in accordance with the guidance for contract modifications in subpart 4.2, Contract Distribution.

(b) Copies of the negotiation memorandum prepared under contracting officer determination or audit report prepared under auditor determination shall be furnished, as appropriate, to the contracting offices and Government audit offices.

**42.707 Cost-sharing rates and limitations on indirect cost rates.**

(a) Cost-sharing arrangements, when authorized, may call for the contractor to participate in the costs of the contract by accepting indirect cost rates lower than the anticipated actual rates. In such cases, a negotiated indirect cost rate ceiling may be incorporated into the contract for prospective application. For cost sharing under research and development contracts, see 35.003(b).

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(b)(1) Other situations may make it prudent to provide a final indirect cost rate ceiling in a contract. Examples of such circumstances are when the proposed contractor—

(i) Is a new or recently reorganized company, and there is no past or recent record of incurred indirect costs;

(ii) Has a recent record of a rapidly increasing indirect cost rate due to a declining volume of sales without a commensurate decline in indirect expenses; or

(iii) Seeks to enhance its competitive position in a particular circumstance by basing its proposal on indirect cost rates lower than those that may reasonably be expected to occur during contract performance, thereby causing a cost overrun.

(2) In such cases, an equitable ceiling covering the final indirect cost rates may be negotiated and specified in the contract.

(c) When ceiling provisions are utilized, the contract shall also provide that (1) the Government will not be obligated to pay any additional amount should the final indirect cost rates exceed the negotiated ceiling rates and, (2) in the event the final indirect cost rates are less than the negotiated ceiling rates, the negotiated rates will be reduced to conform with the lower rates.

### 42.708 Quick-closeout procedure.

(a) The contracting officer responsible for contract closeout shall negotiate the settlement of indirect costs for a specific contract, in advance of the determination of final indirect cost rates, if—

(1) The contract is physically complete;

(2) The amount of unsettled indirect cost to be allocated to the contract is relatively insignificant. Indirect cost amounts will be considered insignificant when—

(i) The total unsettled indirect cost to be allocated to any one contract does not exceed \$1,000,000; and

(ii) Unless otherwise provided in agency procedures, the cumulative unsettled indirect costs to be allocated to one or more contracts in a single fiscal year do not exceed 15 percent of the estimated, total unsettled indirect costs

allocable to cost-type contracts for that fiscal year. The contracting officer may waive the 15 percent restriction based upon a risk assessment that considers the contractor's accounting, estimating, and purchasing systems; other concerns of the cognizant contract auditors; and any other pertinent information; and

(3) Agreement can be reached on a reasonable estimate of allocable dollars.

(b) Determinations of final indirect costs under the quick-closeout procedure provided for by the Allowable Cost and Payment clause at 52.216-7 or 52.216-13 shall be final for the contract it covers and no adjustment shall be made to other contracts for over- or under-recoveries of costs allocated or allocable to the contract covered by the agreement.

(c) Indirect cost rates used in the quick closeout of a contract shall not be considered a binding precedent when establishing the final indirect cost rates for other contracts.

[48 FR 42370, Sept. 19, 1983, as amended at 55 FR 52796, Dec. 21, 1990; 61 FR 31661, June 20, 1996]

### 42.709 Scope.

(a) This section implements 10 U.S.C. 2324 (a) through (d) and 41 U.S.C. 256 (a) through (d). It covers the assessment of penalties against contractors which include unallowable indirect costs in—

(1) Final indirect cost rate proposals; or

(2) The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

(b) This section applies to all contracts in excess of \$500,000, except fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial items.

[60 FR 42658, Aug. 16, 1995]

### 42.709-1 General.

(a) The following penalties apply to contracts covered by this section:

(1) If the indirect cost is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the

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allowability of specific selected costs, the penalty is equal to—

(i) The amount of the disallowed costs allocated to contracts that are subject to this section for which an indirect cost proposal has been submitted; plus

(ii) Interest on the paid portion, if any, of the disallowance.

(2) If the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is two times the amount in paragraph (a)(1)(i) of this section.

(b) These penalties are in addition to other administrative, civil, and criminal penalties provided by law.

(c) It is not necessary for unallowable costs to have been paid to the contractor in order to assess a penalty.

[60 FR 42658, Aug. 16, 1995]

## 42.709-2 Responsibilities.

(a) The cognizant contracting officer is responsible for—

(1) Determining whether the penalties in 42.709-1(a) should be assessed;

(2) Determining whether such penalties should be waived pursuant to 42.709-5; and

(3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted unallowable costs.

(b) The contract auditor, in the review and/or the determination of final indirect cost proposals for contracts subject to this section, is responsible for—

(1) Recommending to the contracting officer which costs may be unallowable and subject to the penalties in 42.709-1(a);

(2) Providing rationale and supporting documentation for any recommendation; and

(3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted unallowable costs.

[60 FR 42658, Aug. 16, 1995]

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### 42.709-3 Assessing the penalty.

Unless a waiver is granted pursuant to 42.709-5, the cognizant contracting officer shall—

(a) Assess the penalty in 42.709-1(a)(1), when the submitted cost is expressly unallowable under a cost principle in the FAR or an executive agency supplement that defines the allowability of specific selected costs; or

(b) Assess the penalty in 42.709-1(a)(2), when the submitted cost was determined to be unallowable for that contractor prior to submission of the proposal. Prior determinations of unallowability may be evidenced by—

(1) A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency;

(2) A contracting officer final decision which was not appealed;

(3) A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance; or

(4) A determination or agreement of unallowability under 31.201-6.

(c) Issue a final decision (see 33.211) which includes a demand for payment of any penalty assessed under paragraph (a) or (b) of this section. The letter shall state that the determination is a final decision under the Disputes clause of the contract. (Demanding payment of the penalty is separate from demanding repayment of any paid portion of the disallowed cost.)

[60 FR 42658, Aug. 16, 1995]

### 42.709-4 Computing interest.

For 42.709-1(a)(1)(ii), compute interest on any paid portion of the disallowed cost as follows:

(a) Consider the overpayment to have occurred, and interest to have begun accumulating, from the midpoint of the contractor's fiscal year. Use an alternate equitable method if the cost was not paid evenly over the fiscal year.

(b) Use the interest rate specified by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(c) Compute interest from the date of overpayment to the date of the demand letter for payment of the penalty.

(d) Determine the paid portion of the disallowed costs in consultation with the contract auditor.

[60 FR 42659, Aug. 16, 1995]

#### **42.709-5 Waiver of the penalty.**

The cognizant contracting officer shall waive the penalties at 42.709-1(a) when—

(a) The contractor withdraws the proposal before the Government formally initiates an audit of the proposal and the contractor submits a revised proposal (an audit will be deemed to be formally initiated when the Government provides the contractor with written notice, or holds an entrance conference, indicating that audit work on a specific final indirect cost proposal has begun);

(b) The amount of the unallowable costs under the proposal which are subject to the penalty is \$10,000 or less (*i.e.*, if the amount of expressly or previously determined unallowable costs which would be allocated to the contracts specified in 42.709(b) is \$10,000 or less); or

(c) The contractor demonstrates, to the cognizant contracting officer's satisfaction, that—

(1) It has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals (*e.g.*, the types of controls required for satisfactory participation in the Department of Defense sponsored self-governance programs, specific accounting controls over indirect costs, compliance tests which demonstrate that the controls are effective, and Government audits which have not disclosed recurring instances of expressly unallowable costs); and

(2) The unallowable costs subject to the penalty were inadvertently incorporated into the proposal; *i.e.*, their inclusion resulted from an unintentional error, notwithstanding the exercise of due care.

[60 FR 42659, Aug. 16, 1995]

#### **42.709-6 Contract clause.**

Use the clause at 52.242-3, Penalties for Unallowable Costs, in all solicitations and contracts over \$500,000 except fixed-price contracts without cost incentives or any firm-fixed-price contract for the purchase of commercial items. Generally, covered contracts are those which contain one of the clauses at 52.216-7, 52.216-13, 52.216-16, or 52.216-17, or a similar clause from an executive agency's supplement to the FAR.

[60 FR 42659, Aug. 16, 1995]

### **Subpart 42.8—Disallowance of Costs**

#### **42.800 Scope of subpart.**

This subpart prescribes policies and procedures for (a) issuing notices of intent to disallow costs and (b) disallowing costs already incurred during the course of performance.

#### **42.801 Notice of intent to disallow costs.**

(a) At any time during the performance of a contract of a type referred to in 42.802, the cognizant contracting officer responsible for administering the contract may issue the contractor a written notice of intent to disallow specified costs incurred or planned for incurrence. However, before issuing the notice, the contracting officer responsible for administering the contract shall make every reasonable effort to reach a satisfactory settlement through discussions with the contractor.

(b) A notice of intent to disallow such costs usually results from monitoring contractor costs. The purpose of the notice is to notify the contractor as early as practicable during contract performance that the cost is considered unallowable under the contract terms and to provide for timely resolution of any resulting disagreement. In the event of disagreement, the contractor may submit to the contracting officer a written response. Any such response shall be answered by withdrawal of the notice or by making a written decision within 60 days.

(c) As a minimum, the notice shall—

(1) Refer to the contract's Notice of Intent to Disallow Costs clause;

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(2) State the contractor's name and list the numbers of the affected contracts;

(3) Describe the costs to be disallowed, including estimated dollar value by item and applicable time periods, and state the reasons for the intended disallowance;

(4) Describe the potential impact on billing rates and forward pricing rate agreements;

(5) State the notice's effective date and the date by which written response must be received;

(6) List the recipients of copies of the notice; and

(7) Request the contractor to acknowledge receipt of the notice.

(d) The contracting officer issuing the notice shall furnish copies to all contracting officers cognizant of any segment of the contractor's organization.

(e) If the notice involves elements of indirect cost, it shall not be issued without coordination with the contracting officer or auditor having authority for final indirect cost settlement (see 42.705).

(f) In the event the contractor submits a response that disagrees with the notice (see paragraph (b) above), the contracting officer who issued the notice shall either withdraw the notice or issue the written decision, except when elements of indirect cost are involved, in which case the contracting officer responsible under 42.705 for determining final indirect cost rates shall issue the decision.

### 42.802 Contract clause.

The contracting officer shall insert the clause at 52.242-1, Notice of Intent to Disallow Costs, in solicitations and contracts when a cost-reimbursement contract, a fixed-price incentive contract, or a contract providing for price redetermination is contemplated.

### 42.803 Disallowing costs after incurrence.

Cost-reimbursement contracts, the cost-reimbursement portion of fixed-price contracts, letter contracts that provide for reimbursement of costs, and time-and-material and labor-hour contracts provide for disallowing costs during the course of performance after

the costs have been incurred. The following procedures shall apply:

(a) *Contracting officer receipt of vouchers.* When contracting officers receive vouchers directly from the contractor and, with or without auditor assistance, approve or disapprove them, the process shall be conducted in accordance with the normal procedures of the individual agency.

(b) *Auditor receipt of vouchers.* (1) When authorized by agency regulations, the contract auditor may be authorized to (i) receive reimbursement vouchers directly from contractors, (ii) approve for payment those vouchers found acceptable, and (iii) suspend payment of questionable costs. The auditor shall forward approved vouchers for payment to the cognizant contracting, finance, or disbursing officer, as appropriate under the agency's procedures.

(2) If the examination of a voucher raises a question regarding the allowability of a cost under the contract terms, the auditor, after informal discussion as appropriate, may, where authorized by agency regulations, issue a notice of contract costs suspended and/or disapproved simultaneously to the contractor and the disbursing officer, with a copy to the cognizant contracting officer, for deduction from current payments with respect to costs claimed but not considered reimbursable.

(3) If the contractor disagrees with the deduction from current payments, the contractor may—

(i) Submit a written request to the cognizant contracting officer to consider whether the unreimbursed costs should be paid and to discuss the findings with the contractor;

(ii) File a claim under the Disputes clause, which the cognizant contracting officer will process in accordance with agency procedures; or

(iii) Do both of the above.

## Subpart 42.9—Bankruptcy

SOURCE: 56 FR 15154, Apr. 15, 1991, unless otherwise noted.

### 42.900 Scope of subpart.

This subpart prescribes policies and procedures regarding actions to be taken when a contractor enters into

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proceedings relating to bankruptcy. It establishes a requirement for the contractor to notify the contracting officer upon filing a petition for bankruptcy. It further establishes minimum requirements for agencies to follow in the event of a contractor bankruptcy.

### 42.901 General.

The contract administration office shall take prompt action to determine the potential impact of a contractor bankruptcy on the Government in order to protect the interests of the Government.

### 42.902 Procedures.

(a) When notified of bankruptcy proceedings, agencies shall, as a minimum—

(1) Furnish the notice of bankruptcy to legal counsel and other appropriate agency offices (e.g., contracting, financial, property) and affected buying activities;

(2) Determine the amount of the Government's potential claim against the contractor (in assessing this impact, identify and review any contracts that have not been closed out, including those physically completed or terminated);

(3) Take actions necessary to protect the Government's financial interests and safeguard Government property; and

(4) Furnish pertinent contract information to the legal counsel representing the Government.

(b) The contracting officer shall consult the legal counsel, whenever possible, prior to taking any action regarding the contractor's bankruptcy proceedings.

### 42.903 Solicitation provision and contract clause.

The contracting officer shall insert the clause at 52.242-13, Bankruptcy, in all solicitations and contracts exceeding the simplified acquisition threshold.

[56 FR 15154, Apr. 15, 1991, as amended at 60 FR 34759, July 3, 1995; 61 FR 39190, July 26, 1996]

## Subpart 42.10 [Reserved]

## Subpart 42.11—Production Surveillance and Reporting

### 42.1101 General.

Production surveillance is a function of contract administration used to determine contractor progress and to identify any factors that may delay performance. Production surveillance involves Government review and analysis of (a) contractor performance plans, schedules, controls, and industrial processes and (b) the contractor's actual performance under them.

### 42.1102 Applicability.

This subpart applies to all contracts for supplies or services other than facilities, construction contracts, and Federal Supply Schedule contracts. See part 37, especially subpart 37.6, regarding surveillance of contracts for services.

[48 FR 42370, Sept. 19, 1983, as amended at 62 FR 44816, Aug. 22, 1997]

### 42.1103 Policy.

The contractor is responsible for timely contract performance. The Government will maintain surveillance of contractor performance as necessary to protect its interests. When the contracting office retains a contract for administration, the contracting officer administering the contract shall determine the extent of surveillance.

### 42.1104 Surveillance requirements.

(a) The contract administration office determines the extent of production surveillance on the basis of (1) the criticality (degree of importance to the Government) assigned by the contracting officer (see 42.1105) to the supplies or services and (2) consideration of the following factors:

(i) Contract requirements for reporting production progress and performance.

(ii) The contract performance schedule.

(iii) The contractor's production plan.

(iv) The contractor's history of contract performance.

(v) The contractor's experience with the contract supplies or services.

(vi) The contractor's financial capability.

(vii) Any supplementary written instructions from the contracting office.

(b) Contracts at or below the simplified acquisition threshold should not normally require production surveillance.

(c) In planning and conducting surveillance, contract administration offices shall make maximum use of any reliable contractor production control or data management systems.

(d) In performing surveillance, contract administration office personnel shall avoid any action that may (1) be inconsistent with any contract requirement or (2) result in claims of waivers, of changes, or of other contract modifications.

[48 FR 42370, Sept. 19, 1983, as amended at 60 FR 34759, July 3, 1995]

#### **42.1105 Assignment of criticality designator.**

Contracting officers shall assign a criticality designator to each contract in the space for designating the contract administration office, as follows:

<i>Criticality Designator</i>	<i>Criterion</i>
A	Critical contracts, including DX-rated contracts (see subpart 11.6), contracts citing the authority in 6.302-2 (unusual and compelling urgency), and contracts for major systems.
B	Contracts (other than those designated "A") for items needed to maintain a Government or contractor production or repair line, to preclude out-of-stock conditions or to meet user needs for nonstock items.
C	All contracts other than those designated "A" or "B."

[48 FR 42370, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 60 FR 48249, Sept. 18, 1995]

#### **42.1106 Reporting requirements.**

(a) When information on contract performance status is needed, contracting officers may require contractors to submit production progress reports (see 42.1107(a)). Reporting requirements shall be limited to that information essential to Government needs and shall take maximum advantage of data output generated by contractor management systems.

(b) Contract administration offices shall review and verify the accuracy of contractor reports and advise the con-

tracting officer of any required action. The accuracy of contractor-prepared reports shall be verified either by a program of continuous surveillance of the contractor's report-preparation system or by individual review of each report.

(c) The contract administration office may at any time initiate a report to advise the contracting officer (and the inventory manager, if one is designated in the contract) of any potential or actual delay in performance. This advice shall (1) be in writing, (2) be provided in sufficient time for the contracting officer to take necessary action, and (3) provide a definite recommendation, if action is appropriate.

#### **42.1107 Contract clause.**

(a) The contracting officer shall insert the clause at 52.242-2, Production Progress Reports, in solicitations and contracts when production progress reporting is required; unless a facilities contract, a construction contract, or a Federal Supply Schedule contract is contemplated.

(b) When the clause at 52.242-2 is used, the contracting officer shall specify appropriate reporting instructions in the Schedule (see 42.1106(a)).

### **Subpart 42.12—Novation and Change-of-Name Agreements**

#### **42.1200 Scope of subpart.**

This subpart prescribes policies and procedures for—

(a) Recognition of a successor in interest to Government contracts when contractor assets are transferred;

(b) Recognition of a change in a contractor's name; and

(c) Execution of novation agreements and change-of-name agreements by the responsible contracting officer.

#### **42.1201 [Reserved]**

#### **42.1202 Responsibility for executing agreements.**

The contracting officer responsible for processing and executing novation and change-of-name agreements shall be determined as follows:

(a) If any of the affected contracts held by the transferor have been assigned to an administrative contracting officer (ACO) (see 2.1 and 42.202), the responsible contracting officer shall be—

(1) This ACO; or

(2) The ACO responsible for the corporate office, if affected contracts are in more than one plant or division of the transferor.

(b) If none of the affected contracts held by the transferor have been assigned to an ACO, the contracting officer responsible for the largest unsettled (unbilled plus billed but unpaid) dollar balance of contracts shall be the responsible contracting officer.

(c) If several transferors are involved, the responsible contracting officer shall be—

(1) The ACO administering the largest unsettled dollar balance; or

(2) The contracting officer (or ACO) designated by the agency having the largest unsettled dollar balance, if none of the affected contracts have been assigned to an ACO.

#### 42.1203 Processing agreements.

(a) If a contractor wishes the Government to recognize a successor in interest to its contracts or a name change, the contractor must submit a written request to the responsible contracting officer (see 42.1202). If the contractor received its contract under Subpart 8.7 under the Javits-Wagner-O'Day Act, use the procedures at 8.716 instead.

(b) The responsible contracting officer shall—

(1) Identify and request that the contractor submit the information necessary to evaluate the proposed agreement for recognizing a successor in interest or a name change. This information should include the items identified in 42.1204 (e) and (f) or 42.1205(a), as applicable;

(2) Notify each contract administration office and contracting office affected by a proposed agreement for recognizing a successor in interest, and provide those offices with a list of all affected contracts; and

(3) Request submission of any comments or objections to the proposed transfer within 30 days after notifica-

tion. Any submission should be accompanied by supporting documentation.

(c) Upon receipt of the necessary information, the responsible contracting officer shall determine whether or not it is in the Government's interest to recognize the proposed successor in interest on the basis of—

(1) The comments received from the affected contract administration offices and contracting offices;

(2) The proposed successor's responsibility under subpart 9.1, Responsible Prospective Contractors; and

(3) Any factor relating to the proposed successor's performance of contracts with the Government that the Government determines would impair the proposed successor's ability to perform the contract satisfactorily.

(d) The execution of a novation agreement does not preclude the use of any other method available to the contracting officer to resolve any other issues related to a transfer of contractor assets, including the treatment of costs.

(e) Any separate agreement between the transferor and transferee regarding the assumption of liabilities (e.g., long-term incentive compensation plans, cost accounting standards noncompliances, environmental cleanup costs, and final overhead costs) should be referenced specifically in the novation agreement.

(f) Before novation and change-of-name agreements are executed, the responsible contracting officer shall ensure that Government counsel has reviewed them for legal sufficiency.

(g) The responsible contracting officer shall (1) forward a signed copy of the executed novation or change-of-name agreement to the transferor and to the transferee and (2) retain a signed copy in the case file.

(h) Following distribution of the agreement, the responsible contracting officer shall—

(1) Prepare a Standard Form 30, Amendment of Solicitation/Modification of Contract, incorporating a summary of the agreement and attaching a complete list of contracts affected;

(2) Retain the original Standard Form 30 with the attached list in the case file;



(3) Send a signed copy of the Standard Form 30, with attached list to the transferor and to the transferee; and

(4) Send a copy of this Standard Form 30 with attached list to each contract administration office or contracting office involved, which shall be responsible for further appropriate distribution.

[48 FR 42370, Sept. 19, 1983, as amended at 62 FR 64934, Dec. 9, 1997; 63 FR 1533, Jan. 9, 1998; 64 FR 51834, Sept. 24, 1999]

#### **42.1204 Applicability of novation agreements.**

(a) 41 U.S.C. 15 prohibits transfer of Government contracts from the contractor to a third party. The Government may, when in its interest, recognize a third party as the successor in interest to a Government contract when the third party's interest in the contract arises out of the transfer of—

(1) All the contractor's assets; or

(2) The entire portion of the assets involved in performing the contract. (See 14.404-2(1) for the effect of novation agreements after bid opening but before award.) Examples of such transactions include, but are not limited to—

(i) Sale of these assets with a provision for assuming liabilities;

(ii) Transfer of these assets incident to a merger or corporate consolidation; and

(iii) Incorporation of a proprietorship or partnership, or formation of a partnership.

(b) A novation agreement is unnecessary when there is a change in the ownership of a contractor as a result of a stock purchase, with no legal change in the contracting party, and when that contracting party remains in control of the assets and is the party performing the contract. However, whether there is a purchase of assets or a stock purchase, there may be issues related to the change in ownership that appropriately should be addressed in a formal agreement between the contractor and the Government (see 42.1203(e)).

(c) When it is in the Government's interest not to concur in the transfer of a contract from one company to another company, the original contractor remains under contractual obligation to the Government, and the contract

may be terminated for reasons of default, should the original contractor not perform.

(d) When considering whether to recognize a third party as a successor in interest to Government contracts, the responsible contracting officer shall identify and evaluate any significant organizational conflicts of interest in accordance with subpart 9.5. If the responsible contracting officer determines that a conflict of interest cannot be resolved, but that it is in the best interest of the Government to approve the novation request, a request for a waiver may be submitted in accordance with the procedures at 9.503.

(e) When a contractor asks the Government to recognize a successor in interest, the contractor shall submit to the responsible contracting officer three signed copies of the proposed novation agreement and one copy each, as applicable, of the following:

(1) The document describing the proposed transaction, e.g., purchase/sale agreement or memorandum of understanding.

(2) A list of all affected contracts between the transferor and the Government, as of the date of sale or transfer of assets, showing for each, as of that date, the—

(i) Contract number and type;

(ii) Name and address of the contracting office;

(iii) Total dollar value, as amended; and

(iv) Approximate remaining unpaid balance.

(3) Evidence of the transferee's capability to perform.

(4) Any other relevant information requested by the responsible contracting officer.

(f) Except as provided in paragraph (g) of this section, the contractor shall submit to the responsible contracting officer one copy of each of the following documents, as applicable, as the documents become available:

(1) An authenticated copy of the instrument effecting the transfer of assets; e.g., bill of sale, certificate of merger, contract, deed, agreement, or court decree.

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(2) A certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets.

(3) A certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets.

(4) An authenticated copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the Government contracts.

(5) The opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer.

(6) Balance sheets of the transferor and transferee as of the dates immediately before and after the transfer of assets, audited by independent accountants.

(7) Evidence that any security clearance requirements have been met.

(8) The consent of sureties on all contracts listed under paragraph (e)(2) of this section if bonds are required, or a statement from the transferor that none are required.

(g) If the Government has acquired the documents during its participation in the pre-merger or pre-acquisition review process, or the Government's interests are adequately protected with an alternative formulation of the information, the responsible contracting officer may modify the list of documents to be submitted by the contractor.

(h) When recognizing a successor in interest to a Government contract is consistent with the Government's interest, the responsible contracting officer shall execute a novation agreement with the transferor and the transferee. It shall ordinarily provide in part that—

(1) The transferee assumes all the transferor's obligations under the contract;

(2) The transferor waives all rights under the contract against the Government;

(3) The transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and

(4) Nothing in the agreement shall relieve the transferor or transferee from compliance with any Federal law.

(i) The responsible contracting officer shall use the following format for agreements when the transferor and transferee are corporations and all the transferor's assets are transferred. This format may be adapted to fit specific cases and may be used as a guide in preparing similar agreements for other situations.

### NOVATION AGREEMENT

The ABC CORPORATION (Transferor), a corporation duly organized and existing under the laws of \_\_\_\_\_ [insert State] with its principal office in \_\_\_\_\_ [insert city]; the XYZ CORPORATION (Transferee), [if appropriate add "formerly known as the EFG Corporation"] a corporation duly organized and existing under the laws of \_\_\_\_\_ [insert State] with its principal office in \_\_\_\_\_ [insert city]; and the UNITED STATES OF AMERICA (Government) enter into this Agreement as of \_\_\_\_\_ [insert the date transfer of assets became effective under applicable State law].

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

(1) The Government, represented by various Contracting Officers of the \_\_\_\_\_ [insert name(s) of agency(ies)], has entered into certain contracts with the Transferor, namely: \_\_\_\_\_ [insert contract or purchase order identifications]; [or delete "namely" and insert "as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference."]. The term *the contracts*, as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders, including all modifications, made between the Government and the Transferor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Transferor has any remaining rights, duties, or obligations under these contracts and purchase orders). Included in the term *the contracts* are also all modifications made under the terms and conditions of these contracts and purchase orders between the Government and the Transferee, on or after the effective date of this Agreement.

(2) As of \_\_\_\_\_, 20\_\_\_\_, the Transferor has transferred to the Transferee all the assets of the Transferor by virtue of a \_\_\_\_\_ [insert term descriptive of the legal transaction involved] between the Transferor and the Transferee.

(3) The Transferee has acquired all the assets of the Transferor by virtue of the above transfer.

(4) The Transferee has assumed all obligations and liabilities of the Transferor under the contracts by virtue of the above transfer.

(5) The Transferee is in a position to fully perform all obligations that may exist under the contracts.

(6) It is consistent with the Government's interest to recognize the Transferee as the successor party to the contracts.

(7) Evidence of the above transfer has been filed with the Government.

*[When a change of name is also involved; e.g., a prior or concurrent change of the Transferee's name, an appropriate statement shall be inserted (see example in paragraph (8) below)].*

(8) A certificate dated \_\_\_\_\_, 20\_\_, signed by the Secretary of State of \_\_\_\_\_ *[insert State]*, to the effect that the corporate name of EFG CORPORATION was changed to XYZ CORPORATION on \_\_\_\_\_, 20\_\_, has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT BY THIS AGREEMENT—

(1) The Transferor confirms the transfer to the Transferee, and waives any claims and rights against the Government that it now has or may have in the future in connection with the contracts.

(2) The Transferee agrees to be bound by and to perform each contract in accordance with the conditions contained in the contracts. The Transferee also assumes all obligations and liabilities of, and all claims against, the Transferor under the contracts as if the Transferee were the original party to the contracts.

(3) The Transferee ratifies all previous actions taken by the Transferor with respect to the contracts, with the same force and effect as if the action had been taken by the Transferee.

(4) The Government recognizes the Transferee as the Transferor's successor in interest in and to the contracts. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the contracts as if the Transferee were the original party to the contracts. Following the effective date of this Agreement, the term *Contractor*, as used in the contracts, shall refer to the Transferee.

(5) Except as expressly provided in this Agreement, nothing in it shall be construed as a waiver of any rights of the Government against the Transferor.

(6) All payments and reimbursements previously made by the Government to the Transferor, and all other previous actions taken by the Government under the contracts, shall be considered to have discharged those parts of the Government's obligations under the contracts. All payments and reimbursements made by the Government after the date of this Agreement in the name of or to the Transferor shall have the same force and effect as if made to the

Transferee, and shall constitute a complete discharge of the Government's obligations under the contracts, to the extent of the amounts paid or reimbursed.

(7) The Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.

(8) The Transferor guarantees payment of all liabilities and the performance of all obligations that the Transferee (i) assumes under this Agreement or (ii) may undertake in the future should these contracts be modified under their terms and conditions. The Transferor waives notice of, and consents to, any such future modifications.

(9) The contracts shall remain in full force and effect, except as modified by this Agreement. Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,

By \_\_\_\_\_  
Title \_\_\_\_\_

ABC CORPORATION,

By \_\_\_\_\_  
Title \_\_\_\_\_

[CORPORATE SEAL]

XYZ CORPORATION,

By \_\_\_\_\_  
Title \_\_\_\_\_

[CORPORATE SEAL]

#### CERTIFICATE

I, \_\_\_\_\_, certify that I am the Secretary of ABC CORPORATION; that \_\_\_\_\_, who signed this Agreement for this corporation, was then \_\_\_\_\_ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

By \_\_\_\_\_

[CORPORATE SEAL]

#### CERTIFICATE

I, \_\_\_\_\_, certify that I am the Secretary of XYZ CORPORATION; that \_\_\_\_\_, who signed this Agreement for this corporation, was then \_\_\_\_\_ of this corporation; and that this Agreement was

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duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

By \_\_\_\_\_

[CORPORATE SEAL]

[48 FR 42370, Sept. 19, 1983, as amended at 62 FR 64935, Dec. 9, 1997; 65 FR 24325, Apr. 25, 2000]

### 42.1205 Agreement to recognize contractor's change of name.

(a) If only a change of the contractor's name is involved and the Government's and contractor's rights and obligations remain unaffected, the parties shall execute an agreement to reflect the name change. The contractor shall forward to the responsible contracting officer three signed copies of the Change-of-Name Agreement, and one copy each of the following:

(1) The document effecting the name change, authenticated by a proper official of the State having jurisdiction.

(2) The opinion of the contractor's legal counsel stating that the change of name was properly effected under applicable law and showing the effective date.

(3) A list of all affected contracts and purchase orders remaining unsettled between the contractor and the Government, showing for each the contract number and type, and name and address of the contracting office. The contracting officer may request the total dollar value as amended and the remaining unpaid balance for each contract.

(b) The following suggested format for an agreement may be adapted for specific cases:

#### CHANGE-OF-NAME AGREEMENT

The ABC CORPORATION (Contractor), a corporation duly organized and existing under the laws of \_\_\_\_\_ [insert State], and the UNITED STATES OF AMERICA (Government), enter into this Agreement as of \_\_\_\_\_ [insert date when the change of name became effective under applicable State law].

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

(1) The Government, represented by various Contracting Officers of the \_\_\_\_\_ [insert name(s) of agency(ies)], has entered into certain contracts and purchase orders

with the XYZ CORPORATION, namely:

\_\_\_\_\_ [insert contract or purchase order identifications]; [or delete "namely" and insert "as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference."]. The term *the contracts*, as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders, including all modifications, made by the Government and the Contractor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Contractor has any remaining rights, duties, or obligations under these contracts and purchase orders).

(2) The XYZ CORPORATION, by an amendment to its certificate of incorporation, dated \_\_\_\_\_, 20\_\_, has changed its corporate name to ABC CORPORATION.

(3) This amendment accomplishes a change of corporate name only and all rights and obligations of the Government and of the Contractor under the contracts are unaffected by this change.

(4) Documentary evidence of this change of corporate name has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT—

(1) The contracts covered by this Agreement are amended by substituting the name "ABC CORPORATION" for the name "XYZ CORPORATION" wherever it appears in the contracts; and

(2) Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,

By \_\_\_\_\_  
Title \_\_\_\_\_

ABC CORPORATION,

By \_\_\_\_\_  
Title \_\_\_\_\_

[CORPORATE SEAL]

#### CERTIFICATE

I, \_\_\_\_\_, certify that I am the Secretary of ABC CORPORATION; that \_\_\_\_\_, who signed this Agreement for this corporation, was then \_\_\_\_\_ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

By \_\_\_\_\_

[CORPORATE SEAL]

[48 FR 42370, Sept. 19, 1983, as amended at 56 FR 67134, Dec. 27, 1991; 65 FR 24325, Apr. 25, 2000]

### Subpart 42.13—Suspension of Work, Stop-Work Orders, and Government Delay of Work

SOURCE: 48 FR 42159, Sept. 19, 1983, unless otherwise noted. Redesignated at 60 FR 48241, Sept. 18, 1995.

#### 42.1301 General.

Situations may occur during contract performance that cause the Government to order a suspension of work, or a work stoppage. This subpart provides clauses to meet these situations and a clause for settling contractor claims for unordered Government caused delays that are not otherwise covered in the contract.

#### 42.1302 Suspension of work.

A suspension of work under a construction or architect-engineer contract may be ordered by the contracting officer for a reasonable period of time. If the suspension is unreasonable, the contractor may submit a written claim for increases in the cost of performance, excluding profit.

#### 42.1303 Stop-work orders.

(a) Stop-work orders may be used, when appropriate, in any negotiated fixed-price or cost-reimbursement supply, research and development, or service contract if work stoppage may be required for reasons such as advancement in the state-of-the-art, production or engineering breakthroughs, or realignment of programs.

(b) Generally, a stop-work order will be issued only if it is advisable to suspend work pending a decision by the Government and a supplemental agreement providing for the suspension is not feasible. Issuance of a stop-work order shall be approved at a level higher than the contracting officer. Stop-work orders shall not be used in place of a termination notice after a decision to terminate has been made.

(c) Stop-work orders should include—

- (1) A description of the work to be suspended;
- (2) Instructions concerning the contractor's issuance of further orders for materials or services;

(3) Guidance to the contractor on action to be taken on any subcontracts; and

(4) Other suggestions to the contractor for minimizing costs.

(d) Promptly after issuing the stop-work order, the contracting officer should discuss the stop-work order with the contractor and modify the order, if necessary, in light of the discussion.

(e) As soon as feasible after a stop-work order is issued, but before its expiration, the contracting officer shall take appropriate action to—

- (1) Terminate the contract;
- (2) Cancel the stop-work order (any cancellation of a stop-work order shall be subject to the same approvals as were required for its issuance); or
- (3) Extend the period of the stop-work order if it is necessary and if the contractor agrees (any extension of the stop-work order shall be by a supplemental agreement).

#### 42.1304 Government delay of work.

(a) The clause at 52.242-17, Government Delay of Work, provides for the administrative settlement of contractor claims that arise from delays and interruptions in the contract work caused by the acts, or failures to act, of the contracting officer. This clause is not applicable if the contract otherwise specifically provides for an equitable adjustment because of the delay or interruption; e.g., when the Changes clause is applicable.

(b) The clause does not authorize the contracting officer to order a suspension, delay, or interruption of the contract work and it shall not be used as the basis or justification of such an order.

(c) If the contracting officer has notice of an unordered delay or interruption covered by the clause, the contracting officer shall act to end the delay or take other appropriate action as soon as practicable.

(d) The contracting officer shall retain in the file a record of all negotiations leading to any adjustment made under the clause, and related cost or pricing data, or information other than cost or pricing data.

[48 FR 42159, Sept. 19, 1983. Redesignated and amended at 60 FR 48241, 48249, Sept. 18, 1995]

**42.1305 Contract clauses.**

(a) The contracting officer shall insert the clause at 52.242-14, Suspension of Work, in solicitations and contracts when a fixed-price construction or architect-engineer contract is contemplated.

(b)(1) The contracting officer may, when contracting by negotiation, insert the clause at 52.242-15, Stop-Work Order, in solicitations and contracts for supplies, services, or research and development.

(2) If a cost-reimbursement contract is contemplated, the contracting officer shall use the clause with its Alternate I.

(c) The contracting officer shall insert the clause at 52.242-16, Stop-Work Order—Facilities, in solicitations and contracts when a facilities acquisition contract or a consolidated facilities contract is contemplated.

(d) The contracting officer shall insert the clause at 52.242-17, Government Delay of Work, in solicitations and contracts when a fixed-price contract is contemplated for supplies other than commercial or modified-commercial items. The clause use is optional when a fixed-price contract is contemplated for services, or for supplies that are commercial or modified-commercial items.

[48 FR 42159, Sept. 19, 1983, as amended at 50 FR 2270, Jan. 15, 1985; 50 FR 25680, June 20, 1985. Redesignated and amended at 60 FR 48241, 48249, Sept. 18, 1995]

### **Subpart 42.14—Traffic and Transportation Management**

**42.1401 General.**

(a) The contract administration office (CAO) shall ensure that instructions to contractors result in the most efficient and economical use of carrier services and equipment. If the transportation data regarding f.o.b. origin contracts is insufficient for Government transportation management purposes, the CAO shall obtain the data used in the evaluation of offers.

(b) Transportation personnel assigned to or supporting the CAO, or appropriate agency personnel, are responsible for—

(1) Furnishing timely routings and releases for port shipments;

(2) Monitoring shipments to provide for carload or truckload quantities when practicable;

(3) Controlling and issuing U.S. Government bills of lading (GBL's) and determining proper freight classification descriptions;

(4) Reviewing documentation to ensure the proper distribution and validation of shipping documents;

(5) Developing, and advising on, transportation cost differentials brought on by proposed changes in contract terms; e.g., delivery schedules;

(6) Determining, for contract requirements, the size and carrying capability of carrier equipment to transport over-dimensional and/or overweight supplies, hazardous materials, or supplies requiring special shipping arrangements;

(7) Developing information and reporting movements that may be the basis for negotiating special rates for volume movements or for rate adjustments (see 42.1402(b));

(8) Exercising control of irregularities in preservation, packing, loading, blocking and bracing, and other causes contributing to loss and damage; sealing of carrier equipment and documentation;

(9) Providing information on the use of transit arrangements;

(10) Recommending, when appropriate, prepayment by contractor for f.o.b. origin shipments or parcel post (see 47.303-17 and 42.1404);

(11) Recommending, when appropriate, the use of commercial forms and procedures for small shipments of a recurring nature if transportation costs do not exceed \$100, as authorized in 41 CFR 101-41.304-2 and, for the Department of Defense (DOD), in Chapter 32, Defense Traffic Management Regulation (DTMR) (AR 55-355, NAVSUPINST 4600.70, AFM 75-2, MCO P-4600.14A, DLAR 4500.3);

(12) Diverting, reconsigning, tracing, and expediting shipments; and

(13) Considering the capabilities of contractors for meeting new or emergency requirements that arise during the contract administration and using these capabilities when appropriate.

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(14) Using routings through established consolidation stations when it is in the Government's interest.

(c) Civilian agencies shall consult and cooperate with the Office of Transportation of the General Services Administration (GSA) as required in 41 CFR 101-40. (See 47.105, Transportation assistance, for assistance to civilian Government activities or to military installations.)

[48 FR 42370, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986; 55 FR 52796, Dec. 21, 1990; 59 FR 11383, Mar. 10, 1994]

### **42.1402 Volume movements within the continental United States.**

(a)(1) For purposes of contract administration, a volume movement is—

(i) In DOD, the aggregate of freight shipments amounting to or exceeding 25 carloads, 25 truckloads, or 500,000 pounds, to move during the contract period from one origin point for delivery to one destination point or area; and

(ii) In civilian agencies, 50 short tons (100,000 pounds) in the aggregate to move during the contract period from one origin point for delivery to one destination point or area.

(2) Transportation personnel assigned to or supporting the CAO, or appropriate agency personnel, shall report planned and actual volume movements in accordance with agency regulations. DOD activities report to the Military Traffic Management Command (MTMC) under the Defense Traffic Management Regulation (DTMR). Civilian agencies report to GSA, Office of Transportation, or other designated offices under the Federal Property Management Regulations (FPMR), specifically 41 CFR 101-40.305-2.

(b) Reporting of volume movements permits MTMC and GSA transportation personnel to determine the reasonableness of applicable current rates and, when appropriate, to negotiate adjusted or modified rates.

[48 FR 42370, Sept. 19, 1983, as amended at 59 FR 11383, Mar. 10, 1994]

### **42.1403 Shipping documents covering f.o.b. origin shipments.**

(a) Except as provided in 47.303-17, when a contract specifies delivery of supplies f.o.b. origin with transpor-

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tation costs to be paid by the Government, the contractor shall make shipments on U.S. Government bills of lading (GBL's), or on other shipping documents prescribed by MTMC in the case of seavan containers, furnished by the CAO or the appropriate agency transportation office. Each agency shall establish appropriate procedures by which the contractor shall obtain GBL's. The contracting officer shall not authorize the contractor to ship on commercial bills of lading for conversion to GBL's unless delivery is extremely urgent and GBL's are not readily available.

(b) The possible application of reduced rates under section 10721 of the Interstate Commerce Act for shipments on commercial bills of lading and the Commercial Bill of Lading Notations clause are discussed at 47.104.

(c)(1) The limited authority for the use of commercial forms and procedures to acquire freight or express transportation for small shipments of a recurring nature when transportation costs do not exceed \$100, is prescribed in the Transportation Documentation and Audit Regulation, specifically 41 CFR 101-41.304-2.

(2) For DOD shipments, corresponding guidance is in Chapter 32 of the DTMR.

[48 FR 42370, Sept. 19, 1983. Redesignated and amended at 55 FR 52796, Dec. 21, 1990; 59 FR 11383, Mar. 10, 1994]

### **42.1404 Shipments by parcel post or other classes of mail.**

#### **42.1404-1 Parcel post eligible shipments.**

(a)(1) Use of parcel post or other classes of mail permits direct movements from source of supply to the user, without the intermediate documentation that is required when supplies are transported through depots or air or water terminals. However, the use of parcel post and other classes of mail shall be confined to deliveries of mailable matter that meet the size, weight, and distance limitations prescribed by the U.S. Postal Service. Parcel post eligible shipments for overseas destinations will not be sent via Small Package Delivery services or parcel post to CONUS military air or water

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terminals. These shipments will be mailed through the APO or FPO to the overseas user.

(2) When parcel post or other classes of mail are used by contractors, they shall prepay the postage costs by using their own mailing labels or stamps and include prepaid postage costs as separate items in the invoices for supplies shipped.

(b)(1) Authority for contractors to use indicia mail may be obtained by submitting Postal Service (PS) Form 3601, Application to Mail Without Affixing Postage Stamps, to the U.S. Postal Service for approval, following agency procedures. If approval is granted, the agency shall follow the U.S. Postal Service permit requirements.

(2) When indicia mail is used, the contractor will be provided with a completed PS Form 3601 and official penalty permit imprint mailing labels, envelopes, or cards printed on the top right side in a rectangular box: Postage and Fees Paid (first line); Government Agency Name (second line); and, the proper permit imprint number (G-000) on the third line. These must also bear in the upper left corner in every case the printed return address of the agency concerned above the printed phrases "Official Business" and "Penalty for Private Use, \$300." The name and address of a private person or firm shall not be shown.

(c) When a contractor uses the contractor's own label for making a shipment to a post office servicing military and other agency consignees outside the United States, the contractor shall stamp or imprint the parcel immediately above the label in 1/4 inch block letters with (i) the name of the agency and (ii) the words *Official Mail-Contents for Official Use-Exempt from Customs Requirements*. This permits identification and expedites handling within the postal system. Use of this marking does not eliminate the requirement for payment of postage by the contractor when so required by the contract or when the contractor is to be reimbursed for the cost of postage.

(d) Contractors may not insure shipments at Government expense for the purpose of recovery in case of loss and/or damage, except that minimum insurance required for the purposes of ob-

taining receipts at point of origin and upon delivery is authorized.

[48 FR 42370, Sept. 19, 1983, as amended at 53 FR 27467, July 20, 1988; 57 FR 60587, Dec. 21, 1992]

### 42.1404-2 Contract clauses.

(a) The contracting officer shall insert the clause at 52.242-10, F.o.b. Origin—Government Bills of Lading or Prepaid Postage, in solicitations and contracts when f.o.b. origin shipments are to be made using Government bills of lading or prepaid postage.

(b) The contracting officer shall insert the clause at 52.242-11, F.o.b. Origin—Government Bills of Lading or Indicia Mail, in solicitations and contracts when f.o.b. origin shipments are to be made using Government bills of lading or indicia mail, if indicia mail has been authorized by the U.S. Postal Service.

### 42.1405 Discrepancies incident to shipment of supplies.

(a) Discrepancies incident to shipment include overage, shortage, loss, damage, and other discrepancies between the quantity and/or condition of supplies received from commercial carriers and the quantity and/or condition of these supplies as shown on the covering bill of lading or other transportation document. Regulations and procedures for reporting and adjusting discrepancies in Government shipments are in subpart 40.7 of the Federal Property Management Regulations (41 CFR 101-40.7). (Military installations shall consult *Reporting of Transportation Discrepancies in Shipments*, AR 55-38, NAVSUP INST 4610.33C, AFR 75-18, MCO P4610.19D, DLAR 4500.15).

(b) Generally, when the place of delivery is f.o.b. origin, the Government consignee at destination is also accountable for the supplies, and all claims or reports dealing with discrepancies shall be initiated at that point in accordance with the property accountability regulations of the agency concerned.

(c) If supplies are acquired on an f.o.b. destination basis, any claim arising from a discrepancy occurring in transit is a matter for settlement between the contractor and the carrier. However, the Government consignee



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shall (1) notify the carrier of the discrepancy by noting the exception on the carrier's delivery receipt and (2) furnish all available data to the CAO or appropriate agency office, which shall promptly transmit the data to the contractor.

[48 FR 42370, Sept. 19, 1983, as amended at 59 FR 11383, Mar. 10, 1994]

#### **42.1406 Report of shipment.**

##### **42.1406-1 Advance notice.**

Military (and as required, civilian agency) storage and distribution points, depots, and other receiving activities require advance notice of shipments en route from contractors' plants. Generally, this notification is required only for classified material; sensitive, controlled, and certain other protected material; explosives, and some other hazardous materials; selected shipments requiring movement control; or minimum carload or truckload shipments. It facilitates arrangements for transportation control, labor, space, and use of materials handling equipment at destination. Also, timely receipt of notices by the consignee transportation office precludes the incurring of demurrage and vehicle detention charges.

[48 FR 42370, Sept. 19, 1983, as amended at 54 FR 48989, Nov. 28, 1989]

##### **42.1406-2 Contract clause.**

The contracting officer shall insert the clause at 52.242-12, Report of Shipment (REPSHIP), in solicitations and contracts when advance notice of shipment is required for safety or security reasons, or where carload or truckload shipments will be made to DoD installations or, as required, to civilian agency facilities.

[54 FR 48989, Nov. 28, 1989]

### **Subpart 42.15—Contractor Performance Information**

SOURCE: 60 FR 16719, Mar. 31, 1995, unless otherwise noted.

#### **42.1500 Scope of subpart.**

This subpart provides policies and establishes responsibilities for recording and maintaining contractor perform-

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ance information. This subpart does not apply to procedures used by agencies in determining fees under award or incentive fee contracts. However, the fee amount paid to contractors should be reflective of the contractor's performance and the past performance evaluation should closely parallel the fee determinations.

[60 FR 16719, Mar. 31, 1995, as amended at 65 FR 36014, June 6, 2000]

#### **42.1501 General.**

Past performance information is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer.

#### **42.1502 Policy.**

(a) Except as provided in paragraph (b) of this section, agencies shall prepare an evaluation of contractor performance for each contract in excess of \$1,000,000 (regardless of the date of contract award) and for each contract in excess of \$100,000 beginning not later than January 1, 1998 (regardless of the date of contract award), at the time the work under the contract is completed. In addition, interim evaluations should be prepared as specified by the agencies to provide current information for source selection purposes, for contracts with a period of performance, including options, exceeding one year. This evaluation is generally for the entity, division, or unit that performed the contract. The content and format of performance evaluations shall be established in accordance with agency procedures and should be tailored to the size, content, and complexity of the contractual requirements.

(b) Agencies shall not evaluate performance for contracts awarded under

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48 CFR part 8, subparts 8.6 and 8.7. Agencies shall evaluate construction contractor performance and architect/engineer contractor performance in accordance with 48 CFR 36.201 and 36.604, respectively.

[60 FR 16719, Mar. 31, 1995 as amended at 62 FR 51258, Sept. 30, 1997]

### 42.1503 Procedures.

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service.

(b) Agency evaluations of contractor performance prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the contracting agency. Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation. These evaluations may be used to support future award decisions, and should therefore be marked "Source Selection Information". The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information. Disclosure of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations. Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirements of this subpart. A copy of the annual or final past performance evaluation shall be provided to the contractor as soon as it is finalized.

(c) Departments and agencies shall share past performance information with other departments and agencies

when requested to support future award decisions. The information may be provided through interview and/or by sending the evaluation and comment documents to the requesting source selection official.

(d) Any past performance information systems, including automated systems, used for maintaining contractor performance information and/or evaluations should include appropriate management and technical controls to ensure that only authorized personnel have access to the data.

(e) The past performance information shall not be retained to provide source selection information for longer than three years after completion of contract performance.

60 FR 16719, Sept. 30, 1997, as amended at 62 FR 51258, Sept. 30, 1997]

## Subpart 42.16—Small Business Contract Administration

### 42.1601 General.

The contracting officer shall make every reasonable effort to respond in writing within 30 days to any written request to the contracting officer from a small business concern with respect to a contract administration matter. In the event the contracting officer cannot respond to the request within the 30-day period, the contracting officer shall, within the period, transmit to the contractor a written notification of the specific date the contracting officer expects to respond. This provision shall not apply to a request for a contracting officer decision under the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

[60 FR 48230, Sept. 18, 1995]

## Subpart 42.17—Forward Pricing Rate Agreements

SOURCE: 62 FR 51258, Sept. 30, 1997, unless otherwise noted.

### 42.1701 Procedures.

(a) Negotiation of forward pricing rate agreements (FPRA's) may be requested by the contracting officer or the contractor or initiated by the administrative contracting officer (ACO).

In determining whether or not to establish such an agreement, the ACO should consider whether the benefits to be derived from the agreement are commensurate with the effort of establishing and monitoring it. Normally, FPRA's should be negotiated only with contractors having a significant volume of Government contract proposals. The cognizant contract administration agency shall determine whether an FPRA will be established.

(b) The ACO shall obtain the contractor's proposal and require that it include cost or pricing data that are accurate, complete, and current as of the date of submission. The ACO shall invite the cognizant contract auditor and contracting offices having a significant interest to participate in developing a Government objective and in the negotiations. Upon completing negotiations, the ACO shall prepare a price negotiation memorandum (PNM) (see 15.406-3) and forward copies of the PNM and FPRA to the cognizant auditor and to all contracting offices that are known to be affected by the FPRA. A Certificate of Current Cost or Pricing Data shall not be required at this time (see 15.407-3(c)).

(c) The FPRA shall provide specific terms and conditions covering expiration, application, and data requirements for systematic monitoring to ensure the validity of the rates. The agreement shall provide for cancellation at the option of either party and shall require the contractor to submit to the ACO and to the cognizant contract auditor any significant change in cost or pricing data.

(d) When an FPRA is invalid, the contractor should submit and negotiate a new proposal to reflect the changed conditions. If an FPRA has not been established or has been invalidated, the ACO will issue a forward pricing rate recommendation (FPRR) to buying activities with documentation to assist negotiators. In the absence of an FPRA or FPRR, the ACO shall include support for rates utilized.

(e) The ACO may negotiate continuous updates to the FPRA. The FPRA will provide specific terms and conditions covering notification, application, and data requirements for sys-

tematic monitoring to ensure the validity of the rates.

## PART 43—CONTRACT MODIFICATIONS

Sec.

43.000 Scope of part.

### Subpart 43.1—General

- 43.101 Definitions.
- 43.102 Policy.
- 43.103 Types of contract modifications.
- 43.104 Notification of contract changes.
- 43.105 Availability of funds.
- 43.106 [Reserved]
- 43.107 Contract clause.

### Subpart 43.2—Change Orders

- 43.201 General.
- 43.202 Authority to issue change orders.
- 43.203 Change order accounting procedures.
- 43.204 Administration.
- 43.205 Contract clauses.

### Subpart 43.3—Forms

- 43.301 Use of forms.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42386, Sept. 19, 1983, unless otherwise noted.

### 43.000 Scope of part.

This part prescribes policies and procedures for preparing and processing contract modifications for all types of contracts including construction and architect-engineer contracts. It does not apply to—

(a) Orders for supplies or services not otherwise changing the terms of contracts or agreements (e.g., delivery orders under indefinite-delivery contracts); or

(b) Modifications for extraordinary contractual relief (see part 50).

### Subpart 43.1—General

#### 43.101 Definitions.

As used in this part—

*Administrative change* means a unilateral (see 43.103(b)) contract change, in writing, that does not affect the substantive rights of the parties (e.g., a change in the paying office or the appropriation data).